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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 338

HUGH ERBIE BROOKS et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

The petitioners pray that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above cause, entered July 16, 1962, affirming the judgment of the United States District Court for the Middle District of Tennessee.

OPINION BELOW.

The opinion of the Court of Appeals affirming the judgment of the District Court has not been generally reported. A copy is appended hereto as Appendix B. The opinion

of the District Court has not been generally reported, but is appended hereto as Appendix C. The District Court entered judgment in Criminal cause number 14,798, sentencing the petitioner Brooks to nine (9) months on the first (1st) count, and $1,000.00 fine without remain on the second (2nd) count; the petitioners Bridgeforth, Simmons, and Kimble were each sentenced to six (6) months on the first (1st) count, and $1,000.00 fine without remain on the second (2nd) count.

JURISDICTION.

The Jurisdiction to review the judgments is conferred on this Court by 28 U. S. C., Section 1254, Subsection (1).

QUESTIONS PRESENTED.

1. Whether a search warrant issued upon unsworn attachments containing the material facts relied upon for such issuance is valid.

2. Whether testimony of subsequent Government witnesses should have been excluded where a Government agent violated the rule of sequestration by repeating in the presence of said subsequent witnesses material statements made on the witness stand.

STATEMENT OF THE CASE.

This petition raises an important question as to sufficiency of the Government's compliance with Rule 41 (c), Federal Rules of Criminal Procedure, as well as an important question of the Court's exercise of discretion in excluding witnesses subsequent to a violation of the rule of sequestration. As applies to the first question, the form in the instant case is as follows: Following the words "and that the facts tending to establish the foregoing

grounds for issuance of a search warrant are as follows:" appear the typewritten words "(continued on Attachment No. 2)"? "Attachment 2" is a writing of three pages, purporting to set forth grounds for issuance of the search warrant. The signature of John B. Anderson, Jr., and the date September 26, 1960, appear at the very bottom of each page. The signature of the Commissioner does not appear on any page, nor does his jurat so appear.

These petitioners respectfully and sincerely insist that attachments are for all intents and purposes supplemental affidavits **(U. S. v. Clay, 246 F. 2d 298)**, and in most instances, as was true in the instant case, contain the substance from which the Commissioner determines the existence of probable cause, or the lack of it. Such supplemental affidavits should be executed in strict conformity with Rule 41 (c), Federal Rules of Criminal Procedure. The writing, to qualify as an affidavit, must also bear the signature of a person authorized to administer oaths, his signature being indicative of the affiant's having sworn before him. This signature is the *sine qua non* of an affidavit, for, stripped of this essential element, the writing is not an affidavit. (Doty v. Boyd, 24 S. E. 59; 46 S. C. 39; Federal Chemical v. Farmers' Produce, Mo. App., 118 S. W. 2d 1067; Morris v. State, 2 Tex. App. 502; Knapp v. Duclo, 1 Mich. N. P. 189; Kirk v. Hortlieb, 97 S. W. 2d 434, 193 Ark. 37.)

Using the language of the Court of Appeals, 6th Circuit, in this very case (Decree, pg. 2):

> "... Mr. Anderson testified that the attachments and everything else were attached to the form copy of the search warrant, at the time he swore to it.
>
> "The affidavit form and the attachments appear to be one complete document, regular on its face and we presume Mr. Anderson, the special agent, and Mr.

Moore, the commissioner, properly performed their duties"

As to whether or not the Commissioner read the attachments to determine the existence of probable cause is left to presumption, supposition and conjecture. The signature of the Commissioner does not appear on any page, nor does his jurat so appear. The seal of the United States District Court appears on each page of defendant's copy, which indicates that the copy is an authentic replica of the original on file in the office of the Clerk. **Should the Commissioner be less diligent in the performance of his judicial function than is the Clerk in the performance of an administrative one?**

The other question involved arises as follows: Subsequent to the cross-examination of Special Agent Anderson, who was the first witness for the Government, the Court declared a brief recess, during which time Special Agent Lowry, who had been present in Court during all prior proceedings (he not having been placed under the rule), was seen to enter the witness room. Immediately after this recess, the Attorney for the United States sought to call Agent Lowry as a Government witness. This was objected to by counsel for petitioners for reason that said Agent Lowry had been present in Court during the entire proceedings prior to said recess, and had discussed a portion of the testimony with other witnesses who were in the witness room during said recess.

After ascertaining that some information had been exchanged, the Court disqualified Agent Lowry, but denied petitioner's motion to disqualify the subsequent Government witnesses who heard and understood what Agent Lowry was driving at.

These petitioners further respectfully and sincerely contend that while the sequestration of witnesses is a matter

of discretion with the trial Judge, once sequestration has been granted, it is entitled to full and complete recognition and protection so that it might fully serve the purpose for which it was designed. None will ever know that the information carried to the witness room by Agent Lowry, in violation of the rule of sequestration, was the chief factor in jogging the memories of the agents who had not testified to the ultimate conviction of these petitioners. To be sure, the District Judge observed if there was material information carried to the witness room, it should disqualify the witnesses who had not testified.

One of the points made in appellants' motion to suppress was that the Federal Agents in conducting the raid failed to disclose their identity or to announce their authority or purpose. No agent testified specifically that this had been done, and by whom, until after Agent Lowry's excursion to the witness room. Such announcement was essential to a subsequent legal entry, the failure of which would constitute an invasion of the petitioners' constitutional safeguards, and created irreparable damage which cannot be corrected in any subsequent hearing.

STATUTES INVOLVED.

1. The questions presented herein raise issues under 26 U. S. C. 4411, 4412, 7203, 7362, commonly known as the occupational wagering tax statutes, Rule 41 (e), Federal Rules of Criminal Procedure, and the U. S. Constitution, 4th Amendment, the text of which appear in Appendix D.

REASONS FOR GRANTING THE WRIT.

The need for clarification of the requisites and methods of obtaining a search warrant is clearly demonstrated by the instant case. There are, of course, two sets of rights that must be reconciled and balanced—the rights of the United States and the rights of these petitioners. The instant case demonstrates the extreme to which the In-

ternal Revenue Agents go in skirting the requirements as set forth in Rule 41 (c), Federal Rules of Criminal Procedure. This Court should issue its clear pronouncement as to whether the conduct of the agents as herein outlined with regard to the form of "affidavit" is within the letter and the spirit of Rule 41 (c).

The Fourth Amendment to the United States Constitution reads as follows:

> "The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitutional Amendment above quoted is an affirmative statement of the public policy of the United States extending to the person from whom evidence is unlawfully obtained. There is no question whatever that a search executed by virtue of a warrant defective by reason of invalid affidavits is not a valid search.

CONCLUSION.

It is respectfully submitted that the Court has jurisdiction and should hear this petition from a judgment denying a basic constitutional right guarantee by the United States Constitution.

Respectfully submitted,

LILLARD & BIRCH,

By .....

333½ Fourth Avenue North,
Nashville, Tennessee,
Solicitors for Petitioners.

Premises Considered, Petitioners Pray:

1. That they be permitted to file this petition and the writ of certiorari issue from this Court to the United States Circuit Court of Appeals for the Sixth Circuit, directing the latter Court to cause the record in this cause to be certified and removed to this Court, here to be tried and reviewed with respect to the errors hereinafter assigned.

2. Petitioner also prays for general relief.

This Is the First Application for the Writ of Certiorari in This Cause.

LILLARD & BIRCH,

By .....
Solicitors for Petitioners.

State of Tennessee,
County of Davidson.

Robert E. Lillard makes oath that he is one of the attorneys for the Petitioners in the foregoing Petition and that the allegations therein made and in the accompanying petition for writ of certiorari are true to the best of his knowledge, information and belief, and that he is more familiar with the facts therein stated than are the Petitioners; and that in his opinion the Petitioners are enfitled to the relief sought.

.....
Robert E. Lillard.

Sworn to and subscribed before me this ..... day of August, 1962.

.....
Louise Dozier,
(Seal) Notary Public.

My Commission expires April 28, 1963.

I hereby certify that I forwarded three (3) copies of the foregoing Petition for Writ of Certiorari to the Honorable J. Lee Rankin, Solicitor General for the United States of America, Department of Justice, Washington 25, D. C.

.....

Robert E. Lillard.

Sworn to and subscribed before me this ..... day of August, 1962.

.....

Louise Dozier,

(Seal) Notary Public.

My Commission expires April 28, 1963.

APPENDIX (A).

Judgment Denying Petition for Rehearing.

Office of the Clerk

United States Court of Appeals

For the Sixth Circuit

Cincinnati 2, Ohio

Carl W. Reuss
Clerk

July 16, 1962

Messrs. Lillard & Birch
333½ Fourth Avenue, North
Nashville, Tennessee

Honorable Kenneth Harwell
United States Attorney
Nashville, Tennessee

Re: United States of America vs. Hugh Erbie Brooks, et al.—No. 14,798

Gentlemen:

The Court entered an order today denying the petition for rehearing. The order reads as follows:

"The petition for rehearing herein is hereby denied."

Yours very truly,
Carl W. Reuss,
Clerk.

CWR:mml

Carl W. Reuss, Clerk.

APPENDIX (B).

Opinion.

SIXTH CIRCUIT COURT OF APPEALS.

(Filed Jun. 12 1962, Carl W. Ruess, Clerk.)

No. 14798.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. Hugh Erbie Brooks, Wallace Bridgeforth, James S. Simmons, James Kimble, Defendants-Appellants.	Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided June 12, 1962.

Before: Miller, Chief Judge, Cecil, Circuit Judge, and Boyd, District Judge.

Per Curiam. The appellants herein were convicted in the United States District Court for the Middle District of Tennessee, Nashville Division, on a two-count information.

The first count charged that during the period beginning July 1, 1960, up to and including September 28, 1960, the appellants, being persons engaged in the business of accepting wagers, willfully failed and refused to register with the Director of Internal Revenue, for the Internal Revenue Collection District of Tennessee, at Nashville, in

violation of Section 7203 of the Internal Revenue Code of 1954. The second count charged that they failed and refused to pay an occupational tax, in violation of Section 7262, of the Internal Revenue Code of 1954.

Upon execution of a search warrant, the appellants were found in possession of various numbers tickets and other items used in carrying on a numbers lottery.

One of the claims made by counsel for the appellants is that the search warrant was invalid. In this respect the first contention is that the warrant was issued upon unsworn attachments containing material facts relied upon as a part of the affidavit. The affidavit upon which the search warrant was issued was made upon a form "Affidavit for Search Warrant." The affidavit appears to be signed by John B. Anderson, Jr., Special Agent, Intelligence Division, Internal Revenue Service, and sworn to by him before J. Washington Moore, United States Commissioner.

In the space for a description of the premises to be searched, the description is started and there being insufficient space to complete it, there is a note: "(continued on attachment No. 1)." The description is continued on a plain sheet of paper headed "Attachment No. 1" which is fastened to the affidavit form by staples.

Similarly, in the space for stating the facts to establish the grounds for issuing the warrant, there is a note: "(continued on attachment No. 2)." Under this heading there are three sheets of plain paper containing a statement of facts. These sheets are also attached to the affidavit form by staples. Each of these sheets purports to be signed by John B. Anderson, Jr., and dated "9-26-60," the date of the affidavit. Mr. Anderson testified that the attachments and everything else were attached to the form copy of the search warrant, at the time he swore to it.

The affidavit form and the attachments appear to be one complete document, regular on its face and we presume Mr. Anderson, the special agent, and Mr. Moore, the commissioner, properly performed their duties. If the attachments were fastened to the affidavit form, at the time it was signed and sworn to by Mr. Anderson, the search warrant as issued was valid.

Other objections made to the validity of the search warrant are that the matters set out in the affidavit to establish probable cause for the search are too far removed in point of time to support such a finding and that the premises to be searched were not sufficiently described to be identified and to exclude other premises of similar description.

According to the affidavit of Mr. Anderson, his surveillance began on August 22, 1960, and continued over a period of time, until, on September 26, 1960, he searched the records to ascertain if any one living in the premises described in the affidavit was registered as being engaged in the business of accepting wagers. We do not consider the facts as alleged insufficient to support a finding of probable cause, nor do we consider that the description of the premises to be searched is lacking in particularity.

We find no defect in the search warrant as issued, or in the procedure by which it was procured.

Finally, it is claimed that the testimony of certain government witnesses should have been excluded. At the trial, the court, at the request of counsel for the appellants, granted a motion for sequestration of witnesses. During a recess, after the first government witness had testified, a government special agent, Mr. Lowry, went into the witness room and made a statement that counsel for the appellants asked the witness over and over who shouted at the back door and who first went in the back door.

Whether the rule of sequestration of witnesses is allowed is a matter of discretion with the trial judge. It is equally a matter of discretion for a trial judge, in the conduct of a trial, to determine the application of the rule and whether it has been violated. As stated by Judge Miller in his order overruling motion for new trial, witnesses are not automatically excluded after a violation of the rule. Whether or not there is prejudice is within the sound discretion of the court. See: **United States v. Holder**, 150 U. S. 91; **Easley v. United States**, 261 F. 2d 276, C. A. 5; **Coates v. United States**, 59 F. 2d 172, 175, C. A. 9. Here the trial judge found that the appellants were not prejudiced by reason of the alleged violation of the rule of exclusion, and we are in accord with that conclusion.

Finding no reversible error in the record, the judgment of the District Court is affirmed.

APPENDIX (C).

District Court Opinion.

In the
UNITED STATES DISTRICT COURT
For the Middle District of Tennessee
Nashville Division

United States of America, vs. Hugh Erbie Brooks, Wallace Bridgeforth, James S. Simmons, James Kimble	Nashville Criminal No. 13,401

Judgment of the Court.

Judgment: Hugh Erbie Brooks, upon finding of guilty by the Court: 1st count, Nine (9) months; 2nd count, Fine

$1,000.00 without remain. Motion for Judgment of Acquittal made by defendant at close of Government's proof and renewed at conclusion of all evidence,—denied by the Court. Execution of sentence imposed suspended pending hearing of motion for new trial.

Judgment: Wallace Bridgeforth, upon finding of guilty by the Court: 1st count, Six (6) months; 2nd count, Fine $1,000.00 without remain. Motion for judgment of acquittal made by the defendant at close of Government's proof and renewed at conclusion of all evidence,—denied by the Court. Execution of sentence imposed suspended pending hearing of motion for new trial.

Judgment: James S. Simmons, upon finding of guilty by the Court: 1st count, Six (6) months; 2nd count, Fine $1,000.00 without remain. Motion for judgment of acquittal made by the defendant at close of Government's proof and renewed at conclusion of all evidence,—denied by the Court. Execution of sentence imposed suspended pending hearing of motion for new trial.

Judgment: James Kimble, upon finding of guilty by the Court: 1st count, Six (6) months; 2nd count, Fine $1,000.00 without remain. Motion for judgment of acquittal made by the deft. at close of Government's proof and renewed at conclusion of all evidence,—denied by the Court. Execution of sentence imposed suspended pending hearing of motion for new trial.

APPENDIX (D).

Rule 41 (c), Federal Rules Criminal Procedure.

"A warrant shall issue only on affidavit sworn to before the Judge or Commissioner and establishing the grounds for issuing the warrant . . ."

Internal Revenue Code, 1954.

Section 4411. Imposition of Tax.

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. (Aug. 16, 1954, c. 736, 68A Stat. 527.)"

Section 4412. Registration.

"(a) Requirement.—Each person required to pay a special tax under this subchapter (Sections 4411-4414 of this title) shall register with the official in charge of the Internal Revenue District

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A (Sections 4401-4405 of this title), each place of business where the activity which makes him so liable is carried on, and the name and place or residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A (Sections 4401-4405 of this title), the name and place of *residence of each such person.*

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under

this section as may be needful to the enforcement of this chapter (Sections 4401-4423 of this title). (Aug. 16, 1954, c. 736, 68A Stat. 527.)".

Section 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851.)".

Section 7262. Violation of Occupational Tax Laws Relating to Wagering—Failure to Pay Special Tax.

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 (Sections 4411-4414 of this title) without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000. (Aug. 16, 1954, c. 736, 68A Stat. 862.)"

4th Amendment, U. S. Constitution.